No. 96-1037

In The

Supreme Court of the United States

October Term, 1996

KIOWA TRIBE OF OKLAHOMA,

Petitioner,

vs.

MANUFACTURING TECHNOLOGIES, INC.,

Respondent.

On Writ Of Certiorari To The Oklahoma Court Of Appeals

JOINT BRIEF OF THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY, AND ITS WHOLLY-OWNED CORPORATE ENTITY, LITTLE SIX, INC.; THE SISSETON-WAHPETON SIOUX TRIBE; THE RED LAKE BAND OF CHIPPEWA; AND THE GRAND PORTAGE BAND OF CHIPPEWA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*

The Shakopee Mdewakanton Sioux (Dakota) Community ("SMS(D)C"), the Sisseton-Wahpeton Sioux Tribe, the Red Lake Band of Chippewa, and the Grand Portage Band of Chippewa are federally-recognized Indian tribes, exercising inherent powers of self-government. Little Six, Inc. is a wholly-owned tribal corporation, and the instrumentality through which the SMS(D)C operates its gaming activities pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*

Amici represent a broad range of non-profit and commercial tribal interests, from the struggling Sisseton-Wahpeton Community College, the primary source of higher education for its Tribe's members, to the SMS(D)C's successful Mystic Lake Hotel and Casino. Each of the tribes inhabits a relatively small reservation, and their continued self-governance depends heavily on commercial interaction with non-Indians off of trust lands. Affirmance of the Oklahoma Court of Appeals' decision may directly affect the ultimate disposition of the Minnesota Supreme Court's contrary opinion in *Gavle v. Little Six, Inc.*, 555 N.W.2d 284 (Minn. 1996), *cert. pet. pending*, No. 96-1215 (filed Jan. 29, 1997). Thus, *Amici* strongly support Petitioner, the Kiowa Tribe of Oklahoma. Both parties have consented to this submission.

SUMMARY OF ARGUMENT

The Court should not, at this late date, struggle to equate Indian tribes with foreign governments. Indian

tribes are "domestic Nations," and their sovereign immunity has been defined accordingly. Tribes are uniquely vulnerable within the boundaries of at least one state, and cannot isolate their commercial transactions with the freedom of foreign sovereigns. Indeed, it has been the policy of the Congress, and the inevitable result of this Court's precedent, to encourage tribal and state interaction. In light of the tribes' unique *domestic* sovereign status, the federal government has assumed vital responsibilities of protection and trust. If tribal immunity is to be limited, the federal trust responsibility demands that all of the relevant policy concerns must be addressed in the process. Only Congress and the tribes themselves can limit tribal sovereign immunity with such specificity. But, even if this case were reduced to a simple matter of contract, both the respondent *and the State of Oklahoma* agreed to a result contrary to the arguments they now assert.

I. TRIBAL SOVEREIGN IMMUNITY IS UNIQUE.

"The condition of the Indians in relation to the United States is perhaps unlike that of any two people in existence." *Cherokee Nation v. Georgia*, 30 U.S. 1, 22 (1831). Tribes are neither states nor foreign governments. *Id.* at 17-22. Thus, to paraphrase this Court's admonition, "the differences in the form and nature of their sovereignty make it treacherous to import to one notions of [sovereign immunity] that are properly applied to the other[s]." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). This Court's analysis must reflect the unique dichotomy of tribes as "domestic Nations." *Cf. Arizona v.*

California, 373 U.S. 546, 597 (1963) (recognizing that application to tribe of doctrine developed for states is inappropriate in light of federal role in Indian affairs).

A. Tribal sovereign immunity shares attributes of foreign immunity.

In *Idaho v. Coeur d'Alene Tribe*, a majority of the Court cited an earlier opinion, in which the Court noted that "Indian tribes . . . should be accorded the same status as foreign sovereigns." ___ U.S. ___, 117 S.Ct. 2028, 2033 (1997), *citing Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991). The Court cited this conclusion, *quid pro quo*, as support for the proposition that states did not surrender their inherent immunity for the benefit of tribes "in the plan of the convention." Clearly, tribal immunity shares this attribute with foreign immunity. Indian tribes did not participate in developing the federal system; they saw the federal system imposed around them. Therefore, they did not sacrifice their sovereign immunity in the process.

Tribal immunity pre-existed both the state and federal governments. It was not conferred by the United States. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Immunity from suit is an inherent attribute of Indian tribes that remains "theirs as sovereigns." *United States v. United States Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940). Thus, tribal immunity was *recognized*, not bestowed, by all of the United States through the federal government in its plenary role over Indian affairs.

B. But, direct analogies to foreign sovereigns do not address the unique situation of the tribes in the federal system. Indian tribal immunity is also "similar to that of the United States."

As has been held numerous times to their consistent detriment, Indian tribes are not foreign governments. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823); *Cherokee Nation*, 30 U.S. at 17; *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978). They cannot disassociate themselves entirely from the United States. Likewise, the United States cannot disassociate themselves from the tribes, unless Congress declares its intent explicitly. *See, e.g., Menominee Tribe v. United States*, 388 F.2d 998, 1001 (Ct. Cl. 1967), *aff'd*, 391 U.S. 404 (1968). The immunity that tribes enjoyed as an inherent attribute of isolated tribal sovereignty is now inextricably secured in the tribes' unique relationship with the United States.

1. Tribes are uniquely vulnerable.

In *Nevada v. Hall*, the Court implied that a truly foreign sovereign can avoid the assumption of jurisdiction by withdrawing its money from the banks of the sovereign asserting jurisdiction, and by refusing to recognize the foreign judgment in its own courts. 440 U.S. 410, 417 n.12 (1979). Tribes cannot invoke these protections, however. They have neither the luxury of isolating their commercial transactions to tribal lands, nor the absolute freedom to simply ignore state courts.

Indian tribes are uniquely situated within at least one state. Congress has recognized that tribal governments are constrained by limited reservation resources, and has

provided for Indians and tribes to interact commercially with non-Indians, both on and off trust lands.[1] If, in order to rely on the necessary protections of sovereign immunity, tribes were required to buy from, advertise to, sell to, serve, bank with, and hire only tribal members in Indian country, tribal self-government would cease to exist. Tribes could not, secure in their sovereign status, hire accountants or attorneys with offices off of trust land. Advertisements in newspapers of general circulation would be cited as support for the assumption of state court jurisdiction. Tribes simply could not continue to develop their new economies if every discrete aspect of their commerce were confined to trust lands.[2]

Furthermore, as this case has shown, tribes cannot simply ignore state court judgments. Most tribes likely have debtors that are subject to intervening state court processes. Even if they do not, state courts might simply invoke their state's dominant police power to enforce their orders, regardless of legitimate tribal protests. *See*

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[1] *See, e.g.*, 25 U.S.C. § 305(a) (citing "expansion of the market" as primary duty of the federal Indian Arts & Crafts Board); 25 U.S.C. § 81 (establishing requirements for contracts with Indians); 25 U.S.C. § 2710(b)(2)(d) (contemplating audits of "contracts for supplies, services, or concessions" with regard to Indian gaming); 25 U.S.C. § 2711 (providing for federal approval of contracts between Indian tribes and gaming management companies).

[2] This Court has never attempted to scrutinize the situs of every aspect of Indian commerce when recognizing tribal immunity. *See* F. Cohen, *Handbook of Federal Indian Law* 349 n.7 (1982 ed.) ("[T]he only [immunity] case in which the events were confined completely to Indian country was *Turner v. United States*, 248 U.S. 354 (1919).").

Aircraft Equip. Co. v. Kiowa Tribe of Oklahoma, 68 Okla. Bar Journal 1649 (May 10, 1997) (enforcing seizure by creditor's bill of Kiowa Tribe's oil and gas severance tax and issuing injunction prohibiting the Tribe from enforcing its tax lien law).[3]

Moreover, relying in part on their immunity from suit, many tribes have entered into, or are considering full faith and credit agreements with the states. *See, e.g.*, 12 Okla. Stat. § 2, rule 30 (district court rule providing for reciprocal tribal/state full faith and credit agreements); S.D. Codified Law § 1-1-25 (same). Unless tribes are willing to abrogate these agreements unilaterally, tribal courts may have no choice but to recognize and execute state court judgments (by seizing tribal assets). Foreign governments are not bound by such interdependent relationships.

2. The federal government has accepted the responsibilities of guardianship, with the consent of the states.

When the Constitution was drafted, tribal resources were more abundant and less easily plundered than they are today. Tribes were powerful sovereigns that demanded unified *federal* attention. *Cherokee Nation* at 18 ("At the time the Constitution was framed, . . . [the Indians'] appeal was to the tomahawk, or to the

[3] It is beyond imagination how the Oklahoma Supreme Court can claim that its seizure of tribal tax revenue *and its injunction of tribal law* do not infringe on tribal self-government. One can hardly imagine more direct infringements short of complete termination.

[National] government."). Thus, Indian relations were made the exclusive province of Congress. U.S. Const. art. 1, § 8, cl. 3. As the balance of power gradually shifted in favor of states as a result of tribal concessions to the federal government, the federal trust protection engaged accordingly. *United States v. Kagama*, 118 U.S. 375, 384 (1886) ("From [the tribes'] very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises a duty of protection . . . . "). In exchange for the countless cessions that left tribes prostrate in the middle of states, the federal government assumed vital responsibilities of protection and trust.[4]

The federal trust responsibility requires that the United States, as fiduciary, act in the best interests of the tribes, as beneficiaries, to promote tribal self-government, protect tribal lands and people, and preserve tribal sovereignty in the absence of conflicting *federal* policy. Thus, as

[4] *See Handbook of Federal Indian Law* at 60. "On October 22, 1784, the commissioners [appointed by the Continental Congress] concluded a treaty with the hostile tribes of the Six Nations at Fort Stanwix. Provisions of the treaty helped shape the character of Indian relations. In the first paragraph the United States received the Indian tribes 'into their protection.' This language has been cited as a source of the federal government's obligation to Indian tribes as dependent wards." The origin of this Court's recognition of the trust responsibility is found in the "Cherokee cases": *Cherokee Nation* and *Worcester v. Georgia*, 31 U.S. 515 (1832). *See Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379-80 (1st Cir. 1975).

a practical matter, the trust doctrine often serves to protect tribes against incursions by the states. *Kagama*, 118 U.S. at 383-84 ("These Indian Tribes *are* the wards of the Nation. . . . They owe no allegiance to the States, and receive from them no protection. Because of local ill feeling, the people of the States where they are found are often their deadliest enemies."); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 168-69 (1973); *Williams v. Lee*, 358 U.S. 217, 218 (1959); *State of Washington, Dept. of Ecology v. United States E.P.A.*, 752 F.2d 1465, 1470 (9th Cir. 1985) (recognizing that the trust responsibility "arose largely from the federal role as a guarantor of Indian rights against state encroachment").

3. Tribal immunity is inextricably bound to the sovereign immunity of the United States.

In light of the tribes' unique vulnerability and the obligations of the federal government as guardian, this Court has defined the tribes' sovereign immunity "as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did." *United States Fid. & Guar. Co.* at 512. As Felix Cohen's authoritative *Handbook* notes, "the Supreme Court has held that Indian tribes enjoy sovereign immunity from suit similar to that of the United States." *Handbook of Federal Indian Law* at 324; *see also Ramey Const. Co. v. Apache Tribe*, 673 F.2d 315, 319 (10th Cir. 1982) ("The Indian Tribes' sovereign immunity is co-extensive with

that of the United States.").[5] This implied infusion of federal protection is an appropriate and necessary result of the precarious situation of Indian tribes within the states. *Cf. Minnesota v. United States*, 305 U.S. 382, 386-87 (1939) (recognizing that the United States is a necessary party in suit by state to condemn Indian lands, and is immune from suit).

Because it is permeated with the immunity of the United States itself, then, tribal sovereign immunity has an "extra-territorial" aspect. Tribes, like the United States, are "domestic Nations"; they cannot isolate themselves from the individual states. Thus, "the suability of the United States *and* the Indian Nations, whether directly or by cross-action, depends upon *affirmative* statutory authority." *United States Fid. & Guar. Co.*, 309 U.S. at 514 (emphasis added); *see also Kansas v. United States*, 204 U.S. 331, 341 (1907) (acknowledging that not even a state can sue the United States without its consent). This Court has consistently recognized that tribal immunity, like the

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[5] *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344 (10th Cir. 1982) (recognizing that tribal sovereign immunity "is generally co-extensive with that of the United States"); *Sekaquaptewa v. MacDonald*, 619 F.2d 801, 808 (9th Cir. 1980) ("The United States and Indian tribes . . . possess coextensive sovereign immunity."), *cert. denied*, 449 U.S. 1010 (1980); *Hamilton v. Nakai*, 453 F.2d 152, 158 (9th Cir. 1972) (same), *cert. denied*, 406 U.S. 945 (1972); *Namekagon Dev. Co. v. Bois Forte Reservation Housing Auth.*, 517 F.2d 508, 510 (8th Cir. 1975) ("Indian tribes have always been considered to have an immunity from suit similar to that enjoyed by the federal government."); *Maynard v. Narragansett Tribe*, 798 F. Supp. 94, 97 (D.R.I. 1992) ("Bringing suit against the Tribe mimics an action against the United States government.").

immunity of the United States, cannot be ignored by simply withholding comity. *Id.*

In *Nevada*, the Court conceded that state recognition of truly foreign sovereign immunity may be mandated, not as a matter of comity, but as a matter of right, by "protection [that] is conferred by the United States Constitution." 440 U.S. at 417 n.12. The federal trust responsibility is such a protection, which derives from the unique constitutional relationship of tribes and the state and federal governments.[6]

Furthermore, immunity from suit is an inherent aspect of tribal self-government. *Santa Clara Pueblo*, 436 U.S. at 58. "The reservation of tribal self-government free of state jurisdiction was initially derived by implication from treaties." *Handbook of Federal Indian Law* at 222. The federal treaty relationship, which preserves tribal self-government, is the supreme law of the land. It supersedes any inconsistent state constitutional provision, *Hauenstein v. Lynham*, 100 U.S. 483, 490 (1880), including the one that confers jurisdictional authority on the Oklahoma courts – as those courts have defined it. Notwithstanding the Oklahoma Supreme Court's statement that it is not bound by the holding announced in *Sac & Fox Nation v. Hanson*,

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[6] The Court in *Nevada* also conceded that an agreement may be "implied . . . between two sovereigns," which would foreclose the option of ignoring immunity. 440 U.S. at 416. Concessions by the states to the federal government, on the tribes' behalf, can be implied from the terms of the Indian Commerce Clause, the Treaty Clause, and, often, from the very documents that provided for statehood. *See* discussion *infra* at II.

47 F.3d 1061 (10th Cir. 1995), the court *is* bound by supreme federal law.

C. At the very least, the federal trust responsibility demands that only Congress can limit the scope of inherent tribal immunity, with due regard to the relevant policy interests.

State and federal governments have had over 200 years to develop their economies and assess the relative usefulness of their various immunities. Yet, only recently have they begun to limit sovereign immunity to certain causes of action and certain remedies. For example, only in 1976 did the State of Minnesota refine its immunity by virtue of the Minnesota Tort Claims Act, Minn. Stat. § 3.736. Are states to enjoy the advantage of a few *centuries* of economic growth shielded by absolute immunity, while tribes fight every step of the way for only a few years of such protection? Clearly, this is a question of federal Indian *policy*, that only Congress can answer. *Oklahoma Tax Comm. v. Citizen Band Potawatomi Tribe*, 498 U.S. 505, 510 (1991) ("Congress has always been at liberty to dispense with such immunity or to limit it."); *In re Greene*, 980 F.2d 590, 594 (9th Cir. 1992) ("Congress knows how to limit the sovereign immunity of others when it wants to.").

The United States Constitution clearly operates to divest states of authority to diminish tribal sovereignty, including tribal immunity from suit. *Seminole Tribe of Florida v. Florida*, 517 U.S. ___, 116 S.Ct. 1114, 1126, 134 L.Ed.2d 252, 270 (1996) (recognizing that the states "have

been divested of virtually all authority over Indian commerce and Indian tribes"). As discussed *supra*, the sovereignty of Indian tribes is not a matter of state law, and tribal immunities are protected from diminution by the states. *Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Eng., P.C.*, 476 U.S. 877, 891 (1986). The conclusions of the Oklahoma Supreme Court in its recent line of cases should be recognized for what they are – waivers by implication and affronts to this Court's precedent. State abrogation of tribal immunities presumes more authority than the United States Constitution will support.

Tribal immunities cannot be diminished or abrogated simply because a tribe does business primarily within the boundaries of Oklahoma or New Mexico (the only state courts to treat tribal sovereign immunity as an issue of state law). Because tribal immunities are the exclusive province of Congress, the state in which a tribe transacts business should have no bearing on whether a tribe is protected by sovereign immunity. Virtually all state supreme courts addressing this issue have held that tribes are protected by sovereign immunity for commercial activities occurring outside Indian country.[7] The Kiowa

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[7] *Morgan v. Colorado River Indian Tribe*, 443 P.2d 421 (Ariz. 1968); *North Sea Prod., Ltd. v. Clipper Seafoods Co.*, 595 P.2d 938 (Wash. 1979); *Robles v. Shoshone-Bannock Tribes*, 867 P.2d 134 (Idaho 1994); *In re Ransom v. St. Regis Mohawk Educ. & Comm. Fund, Inc.*, 658 N.E.2d 989 (N.Y. 1995); *Gavle v. Little Six, Inc.*, 555 N.W.2d 284 (Minn. 1996), *cert. pet. pending*, No. 96-1215 (filed Jan. 29, 1997). Even the New Mexico courts have signalled that they are prepared to re-examine the validity of *Padilla v. Pueblo of Acoma*, 754 P.2d 845 (N.M. 1988), *cert. denied*, 490 U.S. 1029 (1989). *See Defeo v. Ski Apache Resort*, 904 P.2d 1065 (N.M. Ct. App. 1995).

Tribe must be treated accordingly as a matter of plenary federal policy. *Williams*, 358 U.S. at 219 n.4 ("The Federal Government's power over Indians is derived . . . from the necessity of giving uniform protection to a dependent people.").

Not even *federal* courts can abrogate tribal sovereign immunity with the specificity demanded by the federal trust responsibility. The jurisdiction of federal courts is not co-extensive with the authority of Congress to limit tribal immunities. U.S. Const. art. 1, § 8, cl. 3. Because the Constitution grants to *Congress* singular power to diminish or abrogate tribal immunities, this Court has been hesitant to act in the absence of clear congressional expressions of intent, recognizing that "until Congress acts, the tribes retain their existing sovereign powers." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). "Because tribes retain all inherent aspects of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 n.14 (1982). Further, "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that [the Court] tread lightly in the absence of clear indications of legislative intent." *Santa Clara Pueblo*, 436 U.S. at 60.

This approach is consistent with this Court's treatment of sovereign immunity generally. The Court has always taken its direction regarding the extent of immunity afforded a sovereign from the executive and legislative branches of the United States government. *Mexico v. Hoffman*, 324 U.S. 30, 35 (1943) ("It is . . . not for the courts to deny an immunity which our government has seen fit

to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize."). Here, federal policy from both the executive and the legislative branches is consistent. As discussed, the policy of the federal government is to acknowledge tribal sovereign immunity, without limitations as to territory, transaction, or harm alleged.

The courts can only eliminate tribal immunity wholesale; they cannot balance the relevant policy considerations and, for example, assign damage limits.[8] They cannot designate the appropriate forums to hear claims against the government.[9] They cannot structure waivers to suit specific causes of action,[10] or establish statutes of limitations.[11] Nor can they weigh the relative merits of maintaining immunity for governmental conduct versus purely commercial activity.[12] In other words, only Congress and the tribes themselves can limit tribal immunity with the specificity required by the federal trust responsibility.

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[8] *Compare* Shakopee Mdewakanton Sioux (Dakota) Community Tort Claim Ordinance § 5 (liability shall not exceed $250,000 per claim or $1,000,000 for multiple claims) (App. 1).

[9] *Compare Id.* at § 4(a).

[10] *Compare* Minn. Stat. § 3.736 (tort claims) and Minn. Stat. § 751 (1997) (contract claims).

[11] *Compare* Minn. Stat. § 3.736(11).

[12] *Compare* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605(2).

II. THE OKLAHOMA COURTS ARE ESTOPPED, AS A MATTER OF AFFIRMATIVE FEDERAL AND STATE LAW, FROM CONSTRUING THEIR JURISDICTIONAL AUTHORITY TO EXTEND TO SUITS AGAINST INDIAN TRIBES.

All state courts are bound to recognize Indian tribes' broad sovereign immunity from suit, which extends to bar suits arising from conduct occurring outside of Indian country. But Oklahoma's recent assumption of jurisdiction is *particularly* egregious when viewed in the context of Oklahoma statehood and the unique concessions made to accommodate pre-existing tribal sovereignty.

A. Tribal sovereign immunity from suit in any court was recognized in Indian Territory before Oklahoma statehood.

It was understood well before Oklahoma statehood that Indian tribes in the Indian and Oklahoma Territories were immune from suit in any court absent express waiver or abrogation. In 1895, in fact, the Eighth Circuit Court of Appeals recognized that the federal court in Indian Territory did not have jurisdiction to hear a contract claim against the Choctaw Tribe. *Thebo v. Choctaw Tribe of Indians*, 66 F. 372 (8th Cir. 1895). In *Thebo*, a non-Indian attempted to sue the Tribe to recover past-due attorney's fees. Upon review of the local federal court's dismissal, the Eighth Circuit recognized that the Choctaw Nation retained attributes of sovereignty, including immunity from suit "in its own courts *or any other*." *Id.* at 375 (emphasis added), *citing Beers v. Arkansas*, 20 How. 527, 5 L.Ed. 991 (1858); *see also In re Greene*, 980 F.2d at 595

(recognizing that it was well understood in the 1800s that sovereign immunity had an extra-territorial component).

The court acknowledged that Congress could, if it so chose, limit or abolish the Tribe's immunity, but it had not done so. *Id.* at 375-76. The court found that "[i]t has been the settled policy of congress not to sanction suits generally against these Indian Nations, or subject them to suits upon contracts or other causes of action at the instance of private parties." *Id.* at 376. Further, "[t]he intention of congress [sic] to confer such a jurisdiction upon *any* court would have to be expressed in plain and unambiguous terms." *Id.* (emphasis added).[13]

The Eighth Circuit's sound reasoning has survived to the present day, but it was particularly resonant in what is now Oklahoma, before and directly after statehood. It was very clear that jurisdiction over tribes could not be assumed by *any* court, but had to be conferred explicitly. It is with this clear understanding that Oklahoma joined the Union as a state in 1907.

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[13] This reasoning also informed the Eighth Circuit's decision in *Adams v. Murphy*, in which the court recognized that the Creek Nation was "exempt from civil suit to compel performance of its contracts or to recover damages for their violation." 165 F. 304, 308 (8th Cir. 1908), *citing Thebo*, 66 F. at 375. The court reversed the contrary decrees of the courts of Indian Territory, and "remanded [the cause] to the Supreme Court of the State of Oklahoma [established during the pendency of the action] for further proceedings not inconsistent with this opinion." *Id.* at 312. There is no apparent publication of the Oklahoma Supreme Court's disposition of the matter, surely its first with regard to tribal sovereign immunity, but it is clear that the court was made aware of the state of the law, if it had not been so already.

B. The Oklahoma Enabling Act expressly provides that nothing in the Oklahoma Constitution can be construed to affect tribal sovereign rights without tribal or congressional consent.

The Oklahoma Enabling Act expressly preserves the sovereign rights of tribes within the new state's borders, unless and until such sovereignty is extinguished:

> That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma as hereinafter provided. *Provided*, that nothing contained in the said constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished). . . .

Act of June 16, 1906, 34 Stat. 267, § 1. Delegates to the state constitutional convention adopted a binding ordinance, irrevocably accepting the terms and conditions of the enabling act. *Coyle v. Smith*, 221 U.S. 559, 564-65 (1911). Thus, as a matter of both federal and state law,[14] state courts cannot assume jurisdiction over tribes by fiat; they must first cite an affirmative congressional abrogation or an express tribal waiver of immunity.

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[14] The state law effect of the state's irrevocable acceptance of the terms and conditions of the enabling act is, of course, a question for the state courts. But, the effect of the act as an affirmative *federal* law is properly addressed by this Court. *See Seneca-Cayuga Tribe v. Oklahoma ex rel. Thompson*, 874 F.2d 709, 712 n.2 (10th Cir. 1989).

The Oklahoma Enabling Act is an affirmative congressional recitation of the "reserved rights doctrine" developed by this Court. *See, e.g., United States v. Winans*, 198 U.S. 371, 381 (1905). It preserves the sovereign status of all Oklahoma tribes, as such sovereignty existed in 1906. By 1906, the courts had recognized that Indian tribes were immune from suit in *any* court without explicit congressional authorization. *Thebo* at 375. Like the State of Kansas, whose enabling act shares a similar provision, Oklahoma "accepted this status when she accepted the act admitting her to the Union." *Blue Jacket v. Bd. of Comm'rs*, 5 Wall. 737, 757; 18 L.Ed. 667, 673 (1867).[15] Oklahoma is bound, not only by this Court's precedent regarding tribal sovereign immunity, but also by the terms of its enabling act to recognize the Kiowa Tribe's immunity, unless and until Congress directs otherwise. *See also Ex Parte Webb*, 225 U.S. 663, 683 (1912) ("It is clear that in framing the [Oklahoma] enabling act, Congress was mindful . . . of its jurisdiction over commerce with the Indian tribes."); *Indian Country U.S.A. v. Oklahoma ex rel. Oklahoma Tax Comm'n*, 829 F.2d 967, 978-980 (10th Cir. 1987) (citing § 1 of the Oklahoma Enabling Act as a general reservation of federal and tribal jurisdiction over Indians), *cert. denied*, 487 U.S. 1218 (1988).

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[15] In *Blue Jacket*, this Court recognized that "[t]here [was] no question of state sovereignty in the case as Kansas accepted her admission into the family of states on condition that the Indian rights should remain unimpaired and the general government at liberty to make any regulation respecting them. . . . " 5 Wall. at 756; 18 L.Ed. at 672; *Cf. Ward v. Race Horse*, 163 U.S. 504, 515 (1896).

Twelve western states with large Indian populations share similar accommodations in their enabling, organic, or statehood acts.[16] Perhaps the most conclusive evidence of the preclusive effect of these provisions is the fact that Congress had to create a *specific* exemption in the original version of Public Law 280, so that states could assume jurisdiction under that act. Act of Aug. 15, 1953, ch. 505, § 6, 67 Stat. 590, *codified at* 25 U.S.C. § 1324. The act allows states to assume jurisdiction under certain circumstances, "notwithstanding the provisions of any enabling Act for the admission of a state." *Id.* In the present case, not only are the Oklahoma courts assuming jurisdiction on their own without direction from Congress, they are doing so despite the clear prohibition in their state's enabling act, which requires a specific *congressional* waiver. *See also McClanahan*, 411 U.S. at 178 (recognizing that Congress would not have imposed requirements in P.L. 280 that states must meet in order to overcome the effect of the enabling acts "if the States were free to accomplish the same goal unilaterally . . . ").

Oklahoma courts derive their jurisdictional authority from the Oklahoma Constitution, as expressly limited by its own terms and by the Oklahoma Enabling Act. Okla. Const. art. VII, § 4. The enabling act, as affirmative federal and state law, mandates that nothing in the Oklahoma Constitution can be construed to limit tribal

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[16] North Dakota, South Dakota, Montana, Washington, Utah, Arizona, New Mexico, Alaska, Idaho, Wyoming, Kansas, and Oklahoma. *See* F. Cohen, *Handbook of Federal Indian Law* 368 n.174 (1982 ed.).

sovereignty. Yet, the courts now construe their constitutional authority to annul the Tribe's sovereign immunity, without citing to any abrogation or waiver. The jurisdiction of the Oklahoma Supreme Court is "co-extensive with the state," Okla. Const., art. VII, § 4, but cannot exceed the jurisdictional limitations of pre-existing tribal sovereignty and supreme federal law. It is a myopic view of history that permits the state courts to assume by fiat that which they never hoped to have without express tribal or congressional authorization.[17]

The State of Oklahoma owes its very existence to a series of congressional abrogations of express treaty promises to several Indian tribes.[18] Nowhere among these

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[17] Unlike some congressional mandates for new states, section one of the Oklahoma Enabling Act concerns an aspect of plenary federal control, Indian commerce, not merely an internal state matter. *Compare Coyle*, 221 U.S. at 574. In *Coyle*, the Court drew a clear distinction between matters of independent federal authority, such as Indian relations, and purely internal state concerns. *Id.* ("It may well be that Congress should embrace in an enactment introducing a new state into the Union legislation intended as a regulation of commerce . . . with the Indian tribes."). In fact, the Court specifically distinguished the provision in the Kansas Enabling Act held to restrict the state's assumption of jurisdiction over the tribe in *Blue Jacket*. *Id.* at 578-79. Obviously, "equal footing" does not equate to absolute jurisdiction. States are still bound by jurisdictional limitations that flow from express accommodations, pre-existing tribal sovereignty, and supreme federal law. *Arizona*, 373 U.S. at 597-98 (1963). Furthermore, section one is not a disclaimer of jurisdiction over tribal *lands*, in which the state may argue it holds all but a proprietary interest. *Compare Organized Village of Kake v. Egan*, 369 U.S. 60, 69 (1962).

[18] *See, e.g.*, Treaty with the Cherokees of Dec. 29, 1835, art. 5, 7 Stat. 478, 481 ("[T]he lands ceded to the Cherokee Nation in

abrogations is there a waiver, express or otherwise, of the Kiowa Tribe's inherent sovereign immunity from suit. When Oklahoma entered the Union in 1907, it did so under unique constraints of accommodation to the numerous tribes that had occupied the area decades and centuries before. Congress could have, but has not terminated the United States' relationship with the Kiowa Tribe. 61 Fed. Reg. 58213 (1996) (official notice recognizing the "Kiowa Indian Tribe of Oklahoma"). As a corollary, Congress could have, but has not cleared the way for the unrestrained exercise of jurisdiction that the Oklahoma courts claim today. It could have limited the scope of the Tribe's broad immunity, conferring jurisdiction on the state courts when the contract at issue is consummated outside of Indian country. Neither the state courts, nor Respondent can cite to any such limitation, however, as none exists.

CONCLUSION

This case reflects a state's assumption, through its judiciary, of a role reserved to Congress in the federal Constitution. Tribal economies across the country exist at various stages of infancy. Sovereign immunity has been

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the foregoing article shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory"); Treaty with the Ottoways, Aug. 30, 1831, art. 9, 7 Stat. 359, 361 (same); Treaty with the Shawnees, Aug. 8, 1831, art. 10, 7 Stat. 355, 357 (same); Treaty with the Choctaws, Sept. 27, 1830, art. 4, 7 Stat. 333 (same); *see also* Angie Debo, *And Still the Waters Run* (1940).

an essential element of Congress' recent Indian policy. *Citizen Band Potawatomi Tribe*, 498 U.S. at 510. The Oklahoma courts have apparently determined that they have no stake in tribal self-sufficiency and have eliminated this valuable protection altogether, but only for tribes doing business in Oklahoma. Now, this Court is called upon to do the same for all tribes that cannot confine their fledgling enterprises to trust lands. To do so, however, is to ignore constraints imposed on all courts, and to deny Congress' interests and obligations altogether.

Even if this case were reduced to a simple matter of contract, both the respondent and the State of Oklahoma agreed to a contrary result. The promissory note on which the respondent bases its claim expressly preserves the sovereign rights of the Tribe. Likewise, the Oklahoma Enabling Act expressly limits the jurisdictional authority of the state courts.

For the foregoing reasons, the decision of the Oklahoma Court of Appeals should be reversed.

Respectfully submitted,

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(LOGO)

OFFICERS

Stanley R. Crooks
Chairman

Glynn A. Crooks
Vice Chairman

Susan Totenhagen
Secretary/Treasurer

RESOLUTION NO. 11-12-96-001
ENACTMENT OF TORT CLAIMS ORDINANCE

WHEREAS, the General Council of the Shakopee Mdewakanton Sioux (Dakota) Community is the governing body of the Community; and

WHEREAS, the General Council is empowered through Article V, Section 1(e) of the Constitution to manage the economic affairs of the Community; and

WHEREAS, the General Council is empowered through Article V, Section (h) of the Constitution to promulgate and enforce ordinances which are intended to safeguard and promote the peace, safety and general welfare of the Community; and

WHEREAS, the General Council has considered the need for a means to address tort claims brought against the Community or its entities; and

WHEREAS, the General Council is aware of the need to provide those persons and organizations that do business with or are guests of the Community and the Community's entities and instrumentalities with a forum for redress of their legitimate claims which may otherwise be barred due to the Shakopee Mdewakanton Sioux (Dakota) Community's sovereign immunity from suit; and

WHEREAS, the General Council has determined that the Community's insurers should pay compensation for damages suffered due to injury to or loss of property, or personal injury or death, where such losses or damages are caused by an act or omission of an employee of the Community while functioning within the scope of the duties of that person's office or employment, under those circumstances where the Community, if a private person, would be liable to the claimant.

NOW THEREFORE BE IT RESOLVED, that the Shakopee Mdewakanton Sioux (Dakota) Community hereby approves and adopts for enactment the attached Shakopee Mdewakanton Sioux (Dakota) Community Tort Claims Ordinance (the "Ordinance"), and directs that the same be forwarded to the Secretary of the Interior or his delegate for approval pursuant to the Constitution of the Community.

BE IT FURTHER RESOLVED, that the Shakopee Mdewakanton Sioux (Dakota) Community hereby waives its sovereign immunity from suit for the limited purpose

of permitting claims made against the Community pursuant to the Ordinance to be brought in Tribal Court, and to permit damages to be awarded against the Community to the extent provided for in Section 5 of the Ordinance, provided the damages are payable from the proceeds of an insurance policy.

/s/ Joe Brewer
Moved by

/s/ Danny Crooks
Seconded by

/s/ Stanley R. Crooks
Stanley R. Crooks,
Chairman

/s/ Glynn Crooks
Glynn Crooks, Vice-Chairman

/s/ Susan Totenhagen
Susan Totenhagen,
Secretary Treasurer

CERTIFICATION

Regular General Council Meeting of November 12, 1996

This Resolution No. 11-12-96-001 was presented to the General Council of the Shakopee Mdewakanton Sioux (Dakota) Community at a Regular General Council meeting held on November 12, 1996. There are 111 eligible voters pursuant to the voting list certified and posted by the Secretary/Treasurer on Sept. 11, 1996.

To the best of my knowledge and belief, the results reported herein accurately reflect the vote of the General Council at the meeting on November 12, 1996.

The Vote on Resolution No. 11-12-96-001 was:

38 For, 0 Against, 0 Spoiled, 2 Abstentions; and 1 Chair not voting

X Passed _Failed

/s/ Joe Brewer
Moved by

/s/ Danny Crooks
Seconded by

/s/ Stanley R. Crooks
Stanley R. Crooks,
Chairman

/s/ Glynn Crooks
Glynn Crooks, Vice-Chairman

/s/ Randolph J. Schacht
Randolph J. Schacht,
Election Commissioner

/s/ Susan Totenhagen
Susan Totenhagen,
Secretary/Treasurer

SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY TORT CLAIMS ORDINANCE

Section 1. Policy

It is the policy of the Shakopee Mdewakanton Sioux (Dakota) Community in the enactment of this Ordinance to exercise its retained inherent sovereignty to implement Community governmental powers, which powers are hereby declared by the Community to be of the same nature as all other Community sovereign powers, and which may be exercised by the Community pursuant to the provisions of the Shakopee Mdewakanton Sioux (Dakota) Community Constitution.

1.02. *Constitutional Authority.* The Constitution of the Shakopee Mdewakanton Sioux (Dakota) Community, Article V provides for the exercise of legislative powers by the Community acting through the General Council to further the economic advancement of the Shakopee Mdewakanton Sioux (Dakota) people. More specifically, this Ordinance is enacted by the Shakopee Mdewakanton Sioux (Dakota) Community General Council under the authority vested in said General Council by Section 1, Subsections (e), (h) and (l) of Article V of the Constitution of the Shakopee Mdewakanton Sioux (Dakota) Community as amended. The General Council reserves the right to repeal or amend the provisions of this Ordinance as necessary.

Section 2. Purpose

The Shakopee Mdewakanton Sioux (Dakota) Community enacts this Tort Claims Ordinance in order to provide those persons and organizations that do business with or

are guests of the Community and the Community's entities and instrumentalities with a forum for redress of their legitimate claims which may otherwise be barred due to the Shakopee Mdewakanton Sioux (Dakota) Community's sovereign immunity from suit. Therefore, the Community will pay compensation for damages suffered due to injury to or loss of property, or personal injury or death, where such losses or damages are caused by an act or omission of an employee of the Community while functioning within the scope of the duties of that person's office or employment, under those circumstances where the Community, if a private person, would be liable to the claimant.

Section 3. Definitions

(A) *Shakopee Mdewakanton Sioux (Dakota) Community* means the Community and all subentities thereof, whether governmental or commercial in nature, including, without limitation, the General Council, the Business Council, any committee or agency thereof, any corporate entity, the Tribal Court, and any other entity commissioned or created by the General Council (hereinafter collectively referred to as the "Community", unless noted otherwise), or by the Business Council.

(B) *Employee of the Community* means all elected officials, all officers, and all other persons employed by the Community.

(C) *Acting within the scope of office or employment* means execution by any employee of the Community of the duties, responsibilities, authorities, powers and functions

of employees in that person's position, whether acting in a governmental, business, professional, or other capacity.

Section 4. Waiver of Sovereign Immunity, Liability of the Community

(A) The Community hereby expressly waives its sovereign immunity from suit for the limited purpose of permitting claims made against the Community pursuant to this Ordinance to be brought in Tribal Court, and to permit damages to be awarded against the Community to the extent provided for in Section 5 herein, provided the damages are payable from the proceeds of an insurance policy. The Community will pay, from the proceeds of an insurance policy, compensation for injury to or loss of property, or for personal injury or death, caused by an act or omission of an employee of the Community while acting within the scope of office or employment, under circumstances where the Community, if a private person, would be liable to the claimant.

(B) The limited waiver of the Community's sovereign immunity from suit provided in paragraph A of this Section shall not extend to cases filed pursuant to this Ordinance in any jurisdiction other than the Shakopee Mdewakanton Sioux (Dakota) Tribal Court. The Community expressly retains its sovereign immunity from suit for all claims brought in all federal, state, and other tribal courts and in any federal, state, and tribal agency or administrative body. The Community further expressly retains its sovereign immunity from suit for those causes of action which are not covered by an insurance policy. Nothing contained herein shall prohibit the Community

from waiving its sovereign immunity to permit claims in excess of the amounts identified in Section 5 hereof, or to permit claims accruing prior to the date of this Ordinance, but only if such claims are heard in the Shakopee Mdewakanton Sioux (Dakota) Community Tribal Court.

(C) The remedies against the Community provided by this Ordinance, whether for damages or injury to or loss of property, or for damages awarded to compensate for personal injury or death caused by an act or omission of an employee of the Community while acting within the scope of office or employment, is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter, whether the claim is made against the employee whose act or omission gave rise to the claim, against the estate of such employee, or against the Community as the employer of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the Community, the employee or the employee's estate is precluded without regard to when the act or omission occurred. Double recovery is prohibited.

Section 5. Limits

The liability of the Community provided in Section 4 of this Ordinance shall not exceed two hundred fifty thousand dollars ($250,000) per claim, or one million dollars ($1,000,000) for multiple claims arising out of a single event or occurrence, exclusive of interest accruing prior to judgment, or punitive damages. The Community

retains the right, where limited circumstances may warrant, to waive its sovereign immunity for claims of a higher amount.

Section 6. Jurisdiction

The Shakopee Mdewakanton Sioux (Dakota) Tribal Court shall have original and exclusive jurisdiction to hear claims brought pursuant to this Ordinance, subject to the terms of the Ordinance, and all claims not brought in the Shakopee Mdewakanton Sioux (Dakota) Tribal Court shall be deemed invalid.

Section 7. Exclusions

Without intent to preclude the Shakopee Mdewakanton Sioux (Dakota) Tribal Court from finding additional cases where the Community and its employees should not, in equity and good conscience, pay compensation for injury to or loss of property, or for personal injury or death, the Community and its employees are not liable for the following losses:

(A) a loss caused by an act or omission of a Community employee exercising due care in the execution of a valid or invalid statute, rule, ordinance or resolution;

(B) a loss caused by the performance or failure to perform a discretionary duty, whether or not the discretion is abused;

(C) a loss in connection with the assessment and collection of taxes;

(D) a loss other than one sustained from injury to or loss of property, or from personal injury or death; and

(E) a loss based on the failure of a person to meet the standards needed for a license, permit, or other authorization issued by the Community, its employees or agents.

Section 8. Defenses

With respect to any claim under this Ordinance, the Community hereby expressly retains its sovereign immunity from suit except as such sovereign immunity would be inconsistent with the provisions of this Ordinance. The Community shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the Community whose act or omission gave rise to the claim, as well as any other defenses to which the Community is entitled.

Section 9. Statute of Limitations

The statute of limitations for all claims brought against the Community is two (2) years and the right to bring a claim against the Community shall begin to accrue on the date of the act or omission giving rise to the claim, or on the date a reasonable person under the same or similar circumstances would have known of the injury, loss or other damages incurred as a consequence of the act or omission of the employee of the Community.

Section 10. Procedure

(A) An action shall not be instituted upon a claim against the Community for injury to or loss of property, or for personal injury or death, caused by an act or omission of any employee of the Community while acting within the scope of that person's office or employment, unless the claimant shall have first presented the claim to legal counsel of the Community.

(B) Legal counsel of the Community shall determine whether the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose.

(C) Upon certification by legal counsel that the defendant employee was acting within the scope of that person's office or employment at the time of the incident out of which the claim arose, the civil action or proceeding shall be deemed an action against the Community under the provisions of this Ordinance and the Community shall be substituted as the party defendant.

(D) In the event that legal counsel has refused to certify that the employee was acting within the scope of that person's office or employment at the time of the incident out of which the claim arose, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of that person's office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the Community under the provisions of this Ordinance, and the Community shall be substituted as the party defendant.

(E) Nothing in this Section shall prevent a claimant from reaching a settlement with the legal counsel of the Community prior to instituting the procedure outlined in this Section.

Section 11. Indemnification of Community Employees

The Community shall indemnify and hold harmless its employees from and against any and all suits, demands, actions, losses, claims, damages, expenses, liabilities, cross-claims and counter-claims, of whatever nature, and costs (including reasonable attorneys' fees in defending against claims) related to, arising out of, based on, or in connection with performing duties within the scope of the employees job or office, where it is determined that the employee acted within their scope of employment or office. The Community is under no duty to indemnify those employees who have not been certified to have acted within the scope of employment or office.

Section 12. Settlement

(A) Legal counsel for the Community is authorized to determine, adjust and settle, at any time, any claim for money damages of $25,000 or less against the Community for injury to or loss of property, or for personal injury or death, caused by an act or omission of any employee of the Community while acting within the scope of office or employment, under circumstances where the Community, if a private person, would be liable to the claimant. The settlement is final and conclusive on all officers and employees of the Community, unless procured by fraud. The acceptance by the claimant of a settlement is final

and conclusive on the claimant and constitutes a complete release of any claim against the Community and the employee or officer of the Community whose act or omission gave rise to the claim, by reason of the same subject matter.

(B) Legal counsel for the Community is authorized to institute settlement discussions regarding any claim for money damages in excess of $25,000 and the Business Council of the Community shall have the authority, upon unanimous vote of all members thereof, to accept or reject a proposed settlement reached by the Community's legal counsel and the claimant(s).

Section 13. Attorney's Fees

No attorney licensed or admitted to practice before the Shakopee Mdewakanton Sioux (Dakota) Tribal Court may charge, demand, receive, or collect for services rendered, fees in excess of twenty-five (25) percent of any judgment rendered pursuant to this Ordinance or in excess of twenty (20) percent of any settlement made pursuant to this Ordinance. Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this Section shall be fined not more than $2,000 and shall lose her or his privilege to practice law before the Shakopee Mdewakanton Sioux (Dakota) Tribal Court.

Section 14. Subrogation

(A) Third parties such as insurance companies, guarantors, bonding companies and other similar organizations

shall be permitted to bring a claim pursuant to this Ordinance in the name of the claimant, provided, however, that such third party shall show that it is expressly permitted to bring a claim and that it has paid a debt to the claimant. No third party shall be entitled to receive compensation pursuant to this Ordinance in an amount greater than that already paid to the claimant. The Shakopee Mdewakanton Sioux (Dakota) Tribal Court may refuse to allow a third party to bring a claim pursuant to this Ordinance when equity so requires.

(B) The appropriate Community insurance carrier shall be permitted to defend on behalf of the Community a claim brought pursuant to this Ordinance.
